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No. 88-1586

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

GEORGE JACKSON,

Petitioner,

v.

LIQUID CARBONIC CORPORATION,
and DAVID FARRELL and BARRY MANUEL,
d/b/a INDUSTRIAL MEDICAL CENTER,

Respondents.

REPLY BRIEF OF PETITIONER

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Petitioner George Jackson submits the following reply to Brief of Respondent Liquid Carbonic Corporation in Opposition ("Opp. Br.").

I. MASSACHUSETTS CONSTITUTIONAL AND PRIVACY LAW DOES NOT TRACK THE DEVELOPMENT OF FEDERAL LAW

A. To support its assertion that the petition raises no federalism issues,

the respondent claims that all parties in this case agree with the validity of the majority opinion's view that "state privacy and constitutional law generally track the development of federal law." Opp. Br.[1] at 32; see also id. at 41 n.8. Respondent is wrong. Petitioner vigorously disputes the majority's view that in privacy law as in constitutional law, Massachusetts law tracks the development of federal law, and that Massachusetts state courts depart from the decisions of federal courts only "to further their views of the principles embodied in the federal [law]." App.[2] 19a-20a.[3]

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[1] "Opp. Br." refers to Brief of Respondent Liquid Carbonic Corporation in Opposition.

[2] "App." as used herein refers to the Appendix to the Petition.

[3] Indeed, the divergence between

The Supreme Judicial Court of Massachusetts has "expressly observed that, when interpreting the Massachusetts Constitution, [it is] not bound by Federal decisions which are less restrictive in some aspects than [the Massachusetts] Declaration of Rights." Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 651, 417 N.E.2d 387, 400 (1981). In accord with that observation, the Supreme Judicial Court has held that various provisions of the Massachusetts Declaration of Rights provide more substantive protection to individuals than exists under parallel

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Massachusetts law and federal law is one reason why petitioner claims that the majority's decision has usurped the state's power to decide for itself the scope of its privacy laws. See Petition at 20-22.

provisions of the United States Constitution, including those addressing such issues as the privilege against self-incrimination,[4] the right to free speech,[5] reproductive freedom,[6] the death penalty,[7] peremptory challenges to

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[4] Compare Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982) (transactional immunity necessary to supplant privilege under state constitution) with Kastigar v. United States, 406 U.S. 441 (1972) (use and derivative use immunity consitutionally adequate to displace the fifth amendment privilege).

[5] Compare Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 445 N.E.2d 590 (1983) (state constitution protects right to seek signatures on private property in connection with ballot access) with Hudges v. NLRB, 424 U.S. 507 (1976) (no right to picket in privately-owned shopping center under First Amendment).

[6] Compare Moe v. Secretary of Admin. & Fin., 382 Mass. at 645-50, 417 N.E.2d at 397-99 with Harris v. McRae, 448 U.S. 297, 317-18 (1980) (funding of medically necessary abortions).

[7] Compare District attorney for the Suffolk Dist. v. Watson, 381 Mass. 648,

exclude jurors on the basis of race,[8] and searches and seizures.[9]

Significantly, on issues involving the privacy interests of Massachusetts citizens, the Supreme Judicial Court has diverged from results reached by this Court "based on differences of opinion concerning the application of similar constitutional principles." Upton, 394 Mass. at 372, 476 N.E.2d at 555.[10] In

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411 N.E.2d 1274 (1980) with Furman v. Georgia, 408 U.S. 238 (1972).

[8] Compare Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979) with Swain v. Alabama, 380 U.S. 202, 222 (1965).

[9] Compare Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985) with Illinois v. Gates, 462 U.S. 213 (1983) (determination of probable cause); Compare Commonwealth v. Blood, 400 Mass. 61, 507 N.E.2d 1029 (1987) with United States v. Caceres, 440 U.S. 741, 750-51 (1979) (one-party consent to warrantless electronic surveillance).

[10] Thus, for purposes of art. 14 of the state constitution, the Supreme Judicial

addressing the specific issue of drug testing based on reasonable suspicion, the Supreme Judicial Court has imposed a more stringent standard under the state constitution than this Court imposed under the federal constitution in Skinner v. Railroad Labor Executives Assoc., ___ U.S. ___, 109 S.Ct. 1402, 1422 (1989). In Horsemen's Benevolent and Protective Association, Inc. v. State Racing Commission, 403 Mass. 692, 702-03, 532 N.E.2d 644, 650 (1989), the Supreme Judicial Court concluded that under the state constitution a

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Court specifically "rejected the 'totality of the circumstances' test now espoused by a majority of the United States Supreme Court," and instead adhered to the Aguilar-Spinelli test rejected by the Court in Illinois v. Gates, 462 U.S. 213 (1983). See Upton, 394 Mass. at 373, 476 N.E.2d at 556.

"regulation providing for testing [of race track licensees] on reasonable suspicion must contain the requisites of probable cause," i.e., facts and circumstances sufficient to warrant a prudent person's belief that a licensee more probably than not has used illicit drugs.[11] Compare Skinner, 109 S.Ct. at 1422 (probable cause not required for urine testing based on reasonable suspicion).

B. Moreover, contrary to the

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[11] To be sure, Horsemen's is not a case in which the state's interest in drug testing raised public safety considerations. See id. at 703-04 n.3, 532 N.E.2d at 650-51. But, even assuming that safety concerns motivated respondent to promulgate its mandatory drug testing program, there is no basis for assuming that the Supreme Judicial Court would make an exception to teh state's probable cause reqiurement under the circumstances presented by this case.

majority's and respondent's conclusion, nothing in any state court decision suggests that the Supreme Judicial Court would require interpretation of the collective-bargaining agreement to resolve petitioner's privacy claims. Because constitutional and common law privacy analysis is in part a question of balancing, the analysis would focus on two things: the employer's interest in the testing and the employee's privacy interests.[12] The analysis may

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[12] It should be noted that respondent's insinuation that its drug testing program may not have implicated any of petitioner's privacy interests since petitioner was already obligated to provide a urine sample under federal regulations, see Opp. Br. at 43, fails to consider the impact of the chemical analysis of the urine and the release of private information. Thus, independent of the taking of the urine sample for testing, both the analysis of the urine samples -- which can disclose a range of private medical facts, such as whether an employee is taking birth control pills or other medication or is pregnant

also include such factors as the extent of regulation in the industry and the nature of the workplace. But there is nothing from which to conclude that a collective bargaining agreement need be scrutinized in that analysis.

C. Finally, in light of the Supreme Judicial Court's history of independence from federal law in its interpretation of state constitutional provisions, and specifically in light of its decision in Horsemen's, respondent's forecast that the Supreme Judicial Court would follow the decision in Skinner if faced with claims such as petitioner's, see Opp. Br. at 41 n.8, is simply unfounded. In

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-- and the potential sharing of the test results with managerial personnel, see App. at 27a-28a, violate an employee's privacy interests. See Horsemen's, 403 Mass. at 700, 532 N.E.2d at 649.

any event, the state court may never have an opportunity to address claims such as those raised by petitioner since it is undisputed that such claims would be considered "completely preempted" for purposes of removal jurisdiction if the judgment of the court below is allowed to stand. See Petition at 21-23.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the court of appeals, or, in the alternative, grant plenary review.

Dated: June 2, 1989

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